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CAN RATIFICATION OF AN AMENDMENT TO THE CONSTITUTION BE MADE TO DEPEND ON A REFERENDUM?

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The Supreme Court of the United States will soon have to construe Article V of the federal Constitution, prescribing the method of adopting amendments to that instrument. First it will have to clear up doubt as to when the Eighteenth Amendment was adopted. The Ohio legislature ratified it, and then on referendum it was disapproved by the electors of Ohio. The Secretary of State of the United States proclaimed the Amendment when Ohio ratified it. If the referendum defeated the ratification by Ohio, then the date of its going into effect is postponed until some state acting thereafter ratified it. This date is important by reference to it in criminal and other statutes.

Again the Ohio Legislature ratified the woman suffrage amendment, but a petition for its referendum to the electors under the Ohio constitution has been filed and the election cannot be had until the general election in November next. Thirty-five states have ratified the suffrage amendment, including Ohio. If the Louisiana legislature, which is to consider the amendment in this month of May, or that of any other state, ratifies, then the Amendment will be adopted by the requisite thirty-six states, unless the pending referendum in Ohio prevents the action of the Ohio legislature from being a valid ratification until sustained by a popular vote. It is possible, therefore, that the question whether women will vote at the next Presidential election will turn on the view the Court takes of Article V. Can ratification of a state under it be made by a state constitution to depend on the result of a referendum to the voters of the state? This is the question.

It reads as follows:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The precise question is whether the word, "Legislatures," as used in this article, means the law-making powers of the states, or whether it means the representative political bodies called "Legislatures." Such authorities as there are upon this point are not in accord.

In *State ex rel. Mullen v. Howell, Secretary of State*,¹ the issue arose on a petition for *mandamus* against the Secretary of State of Washington to compel him to receive and file a petition for a referendum to the electors of the state of the resolution of the Washington legislature ratifying the Eighteenth Amendment. The court held by a vote of six to three that the provision in the state constitution for a referendum of all acts, bills, or laws, passed by the legislature of the states subjected the resolution of ratification to a referendum, on the ground that the word "Legislatures" under Article V meant and included the law-making or legislative power of the states.

In *Hawke v. Smith, Secretary of State*,² the Supreme Court of Ohio, with one dissenting judge, sustained a refusal of the lower court to enjoin the Secretary of State from submitting a referendum on a legislative resolution of ratification of the same amendment on the same ground as that taken by the Washington court. In Ohio the electors voted against ratification. In this case, the Constitution of Ohio specifically provided that resolutions ratifying amendments to the federal Constitution should, on the filing of a proper petition, be submitted to the electors.

In *Herbring v. Brown, Attorney General*,³ the same question arose in Oregon, but the provision for a referendum under the state constitution was held not to include joint resolutions of the kind, and the federal question was not decided.

On the other hand, in *Ex parte Dillon*,⁴ the petitioner for a writ of

¹ (1919, Wash.) 181 Pac. 920.

² (1919, Ohio) 126 N. E. 400.

³ (1919, Ore.) 180 Pac. 328.

⁴ (1920, N. D. Calif.) 262 Fed. 563.

habeas corpus, in custody for violation of a section of the National Prohibition Act which by its terms took effect at the same time as the Eighteenth Amendment, maintained that the Eighteenth Amendment had not gone into effect because of the referendums in Washington and Ohio. Judge Rudkin, District Judge, held that under Article V of the federal Constitution only a ratification by state legislatures was necessary, and that it was not within the power of a state in its constitution to add to such ratification the requirement of a referendum.

In *re the Opinion of the Justices*⁵ the Supreme Justices of Maine made answer to a question of the Governor of the state, that Article V of the federal Constitution did not permit the ratification of an amendment to be submitted to a referendum under the state constitution.

The reasoning used to sustain the Ohio and Washington cases is neither close nor satisfactory. That of Judge Rudkin and the Maine Justices is convincing.

This is a purely federal question, the answer to which state constitutions can not change. Therefore, the fact that the Ohio constitution specifically requires a referendum to the people on federal Amendments does not affect the question, which is solely one of state power. If the word "Legislatures" is merely *corpus designatum*, then there is no power in those adopting state constitutions to make it otherwise.

Except in the election of members of the House of Representatives, the federal Constitution nowhere submits any governmental issue directly to the electors. In the election of President and Senators the issue was left to a representative body elected by the people. The Constitution itself was submitted to the people for adoption by conventions in each state elected by the people. Its amendment or revision was to be submitted to similar representative bodies, to wit, the two houses of Congress, and to the legislatures of the states. This was, in the judgment of those who made and ratified the Constitution, a sufficient submission to the will of the people under the principles of popular representative government.

Chief Justice Marshall, speaking for the Court in *McCullough v. Maryland*, says that the Constitution was adopted by the people of the United States, and not by the states, that

"by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States—and where else should they have assembled? . . . From these Conventions the Constitution derives its whole authority. The government proceeds directly from the people."⁶

In *Dodge v. Woolsey* Mr. Justice Wayne, speaking for the Supreme Court on the supremacy of the Constitution of the United States over state constitutions, says:

⁵ (1919, Me.) 107 Atl. 673.

⁶ (1819, U. S.) 4 Wheat. 316, 403.

"It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the congress of the United States, when two thirds of both Houses shall propose them; or when the legislatures of two thirds of the several States shall call a convention for proposing amendments, which, in either case, becomes valid, to all intents and purposes, as a part of the constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths of them, as one or the other mode of ratification may be proposed by Congress."⁷

When the federal Constitution was adopted, and it is as of that time we are to reach the meaning of words in the instrument, only eight state constitutions contained any provision for their amendment at all, and of these the power was vested with certain restrictions in the legislatures of three of them, and in the other five it was given to conventions to be called for the purpose. Not until 1818 was there any provision for amendment of a state constitution by direct submission to the vote of the people.

That it was the intention to submit the ratification to the popular representative bodies named, and not to their constituencies, is clearly shown by the alternative for the state legislatures which under the Article Congress in its discretion may substitute as the ratifying agencies. These are conventions in the state called for the purpose. These are the same kind of representative bodies which adopted the Constitution and exclude necessarily any idea of further submission to the people directly of the proposed amendment.

This, too, disposes of the argument adopted by the Washington and Ohio courts, that the word "Legislatures" means the law-making power of the states, for certainly a convention called for the purpose of ratifying an amendment is not part of the law-making power of the state.

The unsoundness of this view is further shown by the fact that nowhere in the actual practice under Article V is proposal or ratification of amendments carried on as general legislation must be under the Constitution. If proposal or ratification were mere law making, then under section 7, Article I, action of the two Houses of Congress must be submitted to the President for his approval or disapproval. Yet in *Hollingsworth v. Virginia*⁸ it was held that a proposal by two-thirds of both Houses was sufficient under the article without submitting it to the President for his approval or disapproval, and this view has been confirmed by the practice since and by express resolutions of the Senate.

If ratification by state legislatures under Article V was the exercise of general legislative power of the states, then the Governors of the states must exercise the same power of veto over the resolution of

⁷ (1885, U. S.) 18 How. 331, 348.

⁸ (1798, U. S.) 3 Dallas, 378.

ratification as they do under their respective constitutions over general legislative acts. Yet the uniform practice since the beginning of the Government has been not to submit such resolutions to the state Governors for their action.

The majority opinions in the Washington and Ohio cases place much reliance on the decision of the Supreme Court of the United States in *Davis v. Ohio*.⁹ The constitutional provision there under consideration was Article 1, Section 4, as follows:

"The times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

The issue there was whether a law of Ohio, passed by the legislature, redistricting the state for Congressmen under a new apportionment by Congress, was subject to a referendum under the state constitution. The effect of the judgment of the Court was that the words "prescribed in each State by the Legislature thereof" meant prescribed by the legislative or law-making power of the state, and therefore that the redistricting law of Ohio passed by the Legislature of Ohio, was subject to any general limitation imposed by the state constitution in enacting laws for the state. The majority opinions in Ohio and Washington insist that this Article 1, Section 4, is in *pari materia* with Article V, and the word "Legislature" in the former is to be given the same meaning as the word "Legislatures" in Article V. It is impossible to yield to such a conclusion. The function given to the legislature in Article 1, Section 4, is plainly that of making a law of Ohio just like any other law of the state. The law is to regulate the congressional and senatorial elections held in the state, and differs from other laws only in the circumstance that the power to make it comes from the federal Constitution, and that Congress may alter it. The law is to cover the times, places, and manner of holding such elections. Certainly this is the conferring of a purely general legislative power upon the state, to be exercised as that power is exercised under its constitution. Such redistricting laws are submitted to Governors for the exercise of their power of approval or disapproval as any other law is. Under Article V, however, the state legislatures have no discretion to exercise general legislative power. All they can do is to ratify or reject. They can not amend, qualify or change. What they exercise is a veto power rather than a legislative power. Theirs is a very limited function. The difference between the two clauses is so wide that the decision of the federal Supreme Court is easily distinguished from the case here and has no bearing upon it.

⁹ (1916) 241 U. S. 565, 36 Sup. Ct. 708. [The view advanced in this article has been adopted by the United States Supreme Court in the *Ohio Referendum Cases*, decided June 1, 1920. Ed.]